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Docket No.94-1289

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

JOE CLASS, WARDEN, SOUTH DAKOTA STATE PENITENTIARY, AND MARK W. BARNETT, ATTORNEY GENERAL, STATE OF SOUTH DAKOTA,

Petitioners,

vs.

WILLIE WILLIAMS, III,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DOUGLAS E. HOFFMAN
Counsel of Record
GIBBS, FEYDER, MYERS,
PETERS & HOFFMAN
Attorneys for Respondent
P. O. Box 1085
Sioux Falls, SD 57101-1085
(605) 336-3700

26 pp

QUESTION PRESENTED

WHETHER THE EX POST FACTO CLAUSE PROHIBITS REVOCATION OF AN INMATE'S GOOD TIME CREDITS AS PUNISHMENT FOR A PAROLE VIOLATION, UNDER STATUTORY AUTHORITY ENACTED IN 1983, WHICH WAS AFTER THE INMATE'S 1981 CRIMINAL CONVICTION, BUT WAS PRIOR TO HIS 1987 PAROLE VIOLATION?

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TO THE HONORABLE SUPREME COURT:

The Respondent, Willie Williams, III, respectfully requests that this Court deny the Petition for Writ of Certiorari submitted by the Petitioners, Joe Class, Warden, South Dakota State Penitentiary, and Mark W. Barnett, Attorney General, State of South Dakota.

RELEVANT STATUTORY PROVISIONS

SDCL §24-5-1

> Every inmate sentenced for any term less than life..., subject to the provisions of §§24-2-17 and 24-2-18, is entitled to a deduction of four months from his sentence for each year and pro rata for any part of a year for the first year to the tenth, and six months for the tenth year and for each year thereafter until the expiration of the period of the sentence as pronounced by the Court, for good conduct.

SDCL §24-5-2

> Whenever any inmate has been discharged under the provisions of §24-5-1, he shall at the time of his discharge be considered as restored to the full rights of citizenship. At the time of the discharge of any inmate under the provisions of this chapter, he shall receive from the Secretary of Corrections a certificate stating that he has been restored to the full rights of a citizen. If an inmate is on parole at the time he becomes eligible for discharge, the Secretary of Corrections shall issue a like certificate, which shall be due notice that such inmate has been restored to the full rights of a citizen. ...

SDCL §24-15-13

> Parolees shall at all times be considered confined, in the legal custody of the warden of the penitentiary and shall remain under conviction for the crime for which they were convicted and sentenced.

SDCL §24-15-1.1

> Parole is the discretionary conditional release of an inmate from actual penitentiary custody before the expiration of his term of imprisonment. The prisoner remains an inmate under the legal custody of the Department of Charities and Corrections until the expiration of his term of imprisonment. ...

SDCL §24-2-17

The warden of the penitentiary shall keep a true record of the conduct of each convict, specifying therein each infraction of the rules of discipline. Each convict shall be notified of every entry on his record of each such infraction of the rules of discipline and shall have thirty days to challenge the validity of the entry or the disciplinary sanction imposed by notifying the warden thereof. After investigation, the warden may remove the entry or modify the imposed disciplinary sanction. Such record shall be used whenever the question of any convict's eligibility for parole or discharge shall arise under and by virtue of SDCL §24-5-1.

SDCL §24-2-18

The warden may, at any time prior to a convict's final discharge, consider recommendations of the Disciplinary Committee pertaining to the withholding of statutory time granted for good conduct and may recommend to the Board of Charities and Corrections that the reduction of time for good conduct under and by virtue of §24-5-1 be withheld in full or in part. The Board shall, after hearing, then fix the amount of time earned by good conduct to be withheld. The decision of the Board is final.

1978 South Dakota Session Law, Ch. 186 §30

The Executive Director of the Board of Pardons and Paroles may issue an Order to Show Cause why parole should not be revoked whenever he or the Board is satisfied that:

(1) a parolee is violating or has violated the regulations or restrictions that are placed upon him by the Board;

(2) a parolee has failed to report himself to the Office of Correctional Services;

(3) a parolee has failed to answer inquiries made by the Office of Correctional Services; or

(4) the purposes or objects of parole are not being served.

1978 South Dakota Session Law, Ch. 186 §31

> The Executive Director shall issue a warrant to the warden of the penitentiary, any law enforcement officer, or any parole agent of the Office of Correctional Services, directing that the parolee named be arrested and returned to the state penitentiary under the terms of his original conviction and sentence, pending a hearing on the alleged violations. ... [T]he parolee is to be returned to the penitentiary, there to be held for a hearing to be held before the Board of Pardons and Paroles to determine whether the parole should be revoked. ...If the Board is satisfied that any provision of Section 30 has been violated, it may revoke the parole and reinstate the terms of the original sentence and conviction.

1983 South Dakota Session Law, Ch. 201

> If the Board of Pardons and Paroles is satisfied that any provision of §24-15-20 has been violated, it may revoke the parole and reinstate the terms of the original sentence and conviction. In addition, the Board is authorized to order the reduction of time in full or in part for good conduct granted under §24-5-1. If the Board does not find that the provisions of §24-15-20 have been violated, it may restore the parolee to the original terms and conditions of his parole.

1986 South Dakota Session Law, Ch. 209

> If the Executive Director of the Board is satisfied that any provision of §24-15-20 has been violated, the Executive Director may issue a warrant to the warden of the penitentiary, any law enforcement officer, or parole agent of the Office of Correctional Services, directing that the parolee named be arrested and returned to the state penitentiary under the terms of his original conviction and sentence, pending a hearing on the alleged violations. Upon the issuance of the warrant, the running of the parole supervision time shall be suspended until the Board has entered its final order on the revocation. The Board shall credit the inmate with time spent in custody as a direct result of the parole violation.

STATEMENT OF THE CASE

The single question presented by the Petitioners is "whether the ex post facto clause prohibits revocation of an inmate's good time credits as punishment for a parole violation, under statutory authority enacted in 1983, which was after the inmate's 1981 criminal conviction, but was prior to his 1987 parole violation." A second issue was litigated before the District Court below, to-wit:

> Whether application of SDCL §24-15-21 to toll the running of Respondent's sentence upon the issuance of the parole violation warrant on February 2, 1988, constituted the unconstitutional application of an ex post facto law.

Respondent's good time release date was October 14, 1990. His parole revocation hearing occurred over six months later on April 26, 1991. The legislation providing that the issuance of a parole violation warrant would toll the running of parole supervision time was enacted in 1986, five years after Respondent's original conviction.

In granting the writ of habeas corpus, the District Court ruled in favor of Respondent, holding that application of the tolling provision was ex post facto. Because the sentence was fully served prior to the revocation of the good time credits, the revocation was ineffectual. Therefore, the District Court granted the Writ of Habeas Corpus and ordered that Respondent be released from the penitentiary.

In addition, the District Court ruled in Respondent's favor on the question presented before this Court. The change in South

Dakota statutory law which provided for revocation of good time credits as a sanction for a parole violation was enacted in 1983, again after Respondent's original conviction. The District Court held that application of this legislation to the Respondent was retrospective and prejudicial to Respondent. Consequently, the District Court ruled that Respondent was entitled to habeas relief on that issue as well.

On appeal, the United States Court of Appeals for the Eighth Circuit affirmed the District Court's ruling that the good time credit statute, as applied to Respondent, was ex post facto. The Eighth Circuit found it unnecessary to reach the tolling statute issue and thus expressly declined to consider it. This Petition for Writ of Certiorari, therefore, only seeks review of the good time credit matter, as set forth by the Petitioners in their Question Presented. Respondent's arguments will thus be confined to that issue.

The Respondent, Willie Williams, III, was convicted of first degree rape in Pennington County, South Dakota, on December 10, 1981, and sentenced to fifteen years in the state penitentiary. Respondent's pre-trial detention began on October 14, 1981, and, therefore, with credit for time served, his "straight time" release date was October 14, 1996. As reflected in the South Dakota State Penitentiary Entrance Record and Date Calculation Review document, Respondent was granted six years good time credit pursuant to SDCL §24-5-1, advancing his release date to October 14, 1990. *See In re Revocation of the Parole of Willie Williams, III*, 488 N.W.2d 667, 669 (SD 1992).

Respondent was paroled on December 21, 1984, and subsequently returned to his home state of South Carolina, where he was supervised by local authorities pursuant to the Interstate Compact for Supervision of Parolees. He entered into business there and an IRS lien was imposed on the business. As a result of the lien, one of his business checks to Southern Bell Telephone did not clear the bank, resulting in Respondent's arrest on the charge of writing a fraudulent check. Respondent received a one year sentence, suspended, with probation and restitution in the amount of the check and 120 hours of public service.

On December 8, 1987, Respondent was arrested in Charleston County, South Carolina, on a charge of first degree murder relating to a homicide which allegedly occurred in March of 1986. He was taken into custody and held pending trial. A warrant for the arrest of Respondent for an alleged violation of parole, predicated upon the fraudulent check conviction, was issued by the South Dakota Board of Pardons and Paroles on February 2, 1988. However, no disposition of the warrant was attempted at that time. In May of 1988 Respondent stood trial in South Carolina and was convicted of the murder charge, and thereafter was sentenced to life imprisonment.

On January 7, 1991, Respondent's murder conviction was reversed by the South Carolina Supreme Court, and the case was remanded for a new trial. Respondent remained in custody, however, as a pretrial detainee. On February 26, 1991, South Dakota issued a detainer message to South Carolina relating to the February 2, 1988 arrest warrant. When, in March of 1991,

Respondent posted bond for release pending re-trial in South Carolina, he was detained pursuant to the warrant and returned to South Dakota. A parole revocation hearing was held in Sioux Falls, South Dakota, on April 26, 1991, after which the Board of Pardons and Paroles entered the following Order:

> [T]hat the parole heretofore granted by the Board of Pardons and Paroles to Willie Williams, III, on the 16th day of November, 1984, be hereby revoked with the loss of six (6) years good time; no dead time.

Pursuant to said Order, Respondent was remanded to the South Dakota State Penitentiary to be incarcerated there until October 14, 1996. Following unsuccessful appeals to the South Dakota Circuit Court and South Dakota Supreme Court, Respondent was released pursuant to the United States District Court's Writ of Habeas Corpus which was granted July 26, 1993 and affirmed by the United States Court of Appeals on August 31, 1994. Petitioners' suggestion for a rehearing en banc and Petition for rehearing by the panel were both denied by the Circuit Court on October 20, 1994.

SUMMARY OF ARGUMENT

Respondent's good time release date was October 14, 1990. Under South Dakota law, Respondent's sentence expired on that date unless the 1983 amendment to SDCL §24-15-24 (1983 South Dakota Session Law, Ch. 201), authorizing the parole board to revoke good time credits as a sanction for a parole violation, could be applied to him without violating the ex post facto clause. *In re Williams*, 488 N.W.2d 667, 669 (SD 1992). At the parole revocation hearing which was held on April 26, 1991, the parole board revoked

Respondent's parole with the loss of six years good time. But for the taking of those six years of good time credits, Respondent's sentence expired on October 14, 1990. SDCL §24-5-1; *In re Williams, supra*, at 669.

It is undisputed that at the time of Respondent's underlying conviction there was no provision under South Dakota law granting the Board of Pardons and Paroles or any other entity the authority to revoke a prisoner's statutorily granted good time credits as a sanction for a parole violation. *See In re Williams* at 670. Rather, good time credits could be revoked only within the strict confines of a statutory criteria set forth at SDCL §24-2-17 and §24-2-18. None of the predicates to the withholding of good time credits under those statutes ever occurred in Respondent's case.

In *Collins v. Youngblood*, 497 U.S. 37 (1990), the United States Supreme Court held that "any statute...which makes more burdensome the punishment for a crime after its commission...is prohibited as ex post facto." *Id.* at 42, quoting *Beazell v. Ohio*, 269 U.S.2d 167, 169-70 (1925). Indeed, this constitutional prohibition is addressed to laws, whatever their form, which increase punishment. *Id.* The issue before this Court is whether application of SDCL §24-15-24, as amended by 1983 Session Law Ch. 201, to Respondent works to increase his punishment for the crime of rape, for which he was convicted and sentenced on December 10, 1981. The answer to this question is clear. Absent application of the 1983 amendment, Respondent's sentence expired on October 14, 1990. If the statute is applied, six years of good time credits are revoked, extending his sentence to October 14, 1996.

The net result is that Respondent's punishment was increased by six years.

Given that, under the South Dakota statutes existing at the time of Respondent's conviction and sentence, the state had no authority to withhold Respondent's good time credits as a sanction for a parole violation, it follows that application of SDCL §24-15-24, as amended in 1983, to Respondent constitutes the unconstitutional application of an ex post facto law. *Weaver v. Graham*, 450 U.S. 24 (1981); *Greenfield v. Scafati*, 277 F.Supp. 644 (D. Mass. 1967), aff'd mem. 390 U.S. 713 (1968); *United States v. Paskow*, 11 F.3d 873 (9th Cir. 1993); *Fender v. Thompson*, 883 F.2d 303 (4th Cir. 1989); *Yamamoto v. Parole Commission*, 794 F.2d 1294 (8th Cir. 1986); *Beebe v. Phelps*, 650 F.2d 774 (5th Cir. 1981). All of the United States Courts of Appeals which have addressed analogous situations have ruled in accordance with the decision of the Eighth Circuit below, which is dictated by the precedent of this Court. There is no cognizable issue worthy of the Writ of Certiorari and the Petition therefore should be denied.

ARGUMENT

1. The Circuit Court Decision Below is Correct.

The United States Constitution at Article I, §10 states that "[n]o state shall...pass any...ex post facto law." The seminal case interpreting the federal ex post facto clause is *Weaver v. Graham*, 450 U.S. 24 (1981). The issue in *Weaver* was whether a Florida statute, enacted after the defendant's conviction and which reduced the availability of good time credits to inmates, was unconstitutional as an ex post facto law when applied to him.

450 U.S. at 25. Therein, the United States Supreme Court made clear that the ex post facto prohibition forbids states to enact any law which imposes "punishment more severe than the punishment assigned by the law when the act to be punished occurred." *Id.* at 28, 30. In *Weaver*, this Court set forth the following test for analyzing ex post facto claims:

> [T]wo critical elements must be present for a criminal or penal act to be ex post facto: it must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it.

Id. at 29. The Court explicitly held that a law need not impair a vested right to violate the ex post facto clause. *Id.* Rather, critical to relief under the ex post facto clause is not an individual's right to less punishment, but lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was committed. *Id.* Thus, even if the statute merely alters penal provisions accorded by the grace of the legislature, it violates the clause if it is both retrospective and more onerous than the law in effect on the date of the offense. *Id.* at 30-31.

In the Petition for Writ of Certiorari, Petitioners embrace the holding of the South Dakota Supreme Court in this matter below to the effect that the 1983 amendment to SDCL §24-15-24 was not applied retrospectively to Respondent, based upon the following argument:

> The 1983 statute authorized the Board to reduce an inmate's good time credits for parole violations. This 1983 statute was enacted and in effect when Williams was

> paroled in 1984. ...[T]here was no retrospective application of the 1983 statute.

In re Williams 488 N.W.2d 667, 670 (SD 1992). The South Dakota Supreme Court did not cite any authority for this holding. Nor could it. The holding is clearly contradicted by controlling United States Supreme Court decisions. This was recognized by the District Court and the Circuit Court below in their well-reasoned decisions granting the writ.

Petitioners' interpretation of "retrospective" is refuted by the United States Supreme Court in *Weaver v. Graham*. In *Weaver*, the petitioner pleaded guilty to second degree murder on January 31, 1976. *Id.* at 450 U.S. 25. On January 1, 1979, the good time statute applicable when Weaver was convicted was amended to his disadvantage. The amended statute was applied to Weaver. The respondent in *Weaver* raised a form of the same argument stated by the South Dakota Supreme Court. That is, because Weaver's good time credits were calculated under the more restrictive law only after its enactment, and that good time credits were allotted for his time served prior to the amendment pursuant to the predecessor statutes, the law was not retrospective. This argument was rejected by this Court:

> The respondent maintains that Florida's 1978 law altering the availability of gain time is not retrospective because on its face, it applies only after its effective date.... This argument fails to acknowledge that it is the effect, not the form, of the law, that determines whether it is ex post facto. The critical question is whether the law changes the legal consequences of acts committed before its effective date. <u>In the context of this case, the question can be recast as whether [the 1979 statute] applies to</u>

> prisoners convicted for acts committed before the provision's effective date. Clearly, the answer is in the affirmative. The respondent concedes that the state uses [the statute] which was implemented on January 1, 1979, to calculate the gain time available to petitioner, who is convicted of a crime occurring on January 31, 1976. Thus, the provision attached its legal consequences to a crime committed before the law took effect.

Id. at 450 U.S. 31 (emphasis added).

In essence, the *Weaver* court held that it was not material that the new good time statute was applied to only events which occurred after its enactment. Rather, the salient issue was that the statute was applied to a prisoner who was originally convicted prior to the statute's enactment.

The above holding was first articulated in *Greenfield v. Scafati*, 277 F.Supp. 644 (D. Mass. 1967) aff'd mem., 390 U.S. 713 (1978), where a statute enacted after the inmate's conviction provided for forfeiture of good time credits for violation of parole. 277 F.Supp. at 644-45. That is the precise issue raised by Petitioners herein. The inmate in *Greenfield* suffered forfeiture of good time credits because of a parole violation pursuant to a statute which was enacted after his original conviction, but prior to the date of his parole. 277 F.Supp. at 645.

The *Scafati* court held that, because there was no provision for revocation of good time credits for violation of parole at the time that the prisoner was convicted of his original sentence, application of the amendment to him was both detrimental and retrospective. 277 F.Supp. at 645-46. Petitioner had no "fair notice" of this element of the sentence at the time that he

committed the crime for which he was originally convicted. *Id.* Therefore, the statute was ex post facto as applied to him. This decision was affirmed on direct appeal to the United States Supreme Court by memorandum without written opinion. 390 U.S. at 713. The *Greenfield* decision was cited with approval by this Court in *Weaver v. Graham*. 450 U.S. at 34. Justice Blackman stated that the *Greenfield* decision was the controlling precedent that required his concurrence with the majority opinion in *Weaver*. *Id.* at 37, Blackman, J. concurring.

In an analogous case, the Fifth Circuit Court of Appeals in *Beebe v. Phelps*, 650 F.2d 774 (5th Cir. 1981) reached the same result. *Beebe*, like *Greenfield*, involved the question of whether a statute enacted after the inmate's conviction, but prior to his parole, and which provided for forfeiture of good time credits for violation of parole, was ex post facto when applied to that inmate. 650 F.2d at 775. The *Beebe* court rejected an argument similar to the one raised by Petitioners herein:

> The crucial issue here, however, is not that petitioner had notice that he would forfeit his accrued good time if he violated parole, but that the forfeiture provision, which was passed after the commission of the [underlying offense], alters his punishment for that offense to his disadvantage. The forfeiture is not a punishment for the [offense which constituted the parole violation]. Rather, the forfeiture of good time is a sanction that extends the time remaining on petitioner's original sentence. The practical effect is a statutory increase in punishment for the first offense, enacted subsequent to the commission of the offense.
>
> It appears that *Greenfield v. Scafati*, 277 F.Supp. 644 (D. Mass. 1967) aff'd mem. 390

> U.S. 713, 88 S.Ct. 1409, 20 L.Ed.2d 250 (1968) controls this case.

Id. at 776.

An analogous issue was recently decided in favor of the inmate by the Ninth Circuit Court of Appeals in *United States v. Paskow*, 11 F.3d 873 (9th Cir. 1993). The issue in *Paskow* was

> whether the ex post facto clause is violated when a statutory amendment that increases a penalty to be imposed upon the revocation of supervised release is applied in a case in which the underlying offense was committed before the amendment was adopted but the conduct that led to the revocation of supervised released occurred afterwards.

Id. at 875. Although the new sanction in *Paskow* was not revocation of good time credits, the legal issue in Paskow is precisely the same issue presented to the Court herein. Relying upon *Greenfield v. Scafati*, the Ninth Circuit stated that "the ex post facto clause is violated when a parole violator is punished in a way that adversely affects his ultimate release date under a statute that was adopted after the violator committed the underlying offense but before he violated the terms of his parole." *Id.* at 883. Noting the unanimity of the circuit courts on this issue, the *Paskow* court stated:

> Circuit courts that have considered the ex post facto issue have, without exception, followed *Greenfield*, holding that the ex post facto clause is violated when a defendant's eligibility for release is adversely affected under a statute that was not in effect at the time of the defendant's underlying crime, but was adopted before the defendant committed the act for which his parole was revoked. Without exception, the circuit courts that have considered the ex post facto issue have looked to the date of the defendant's original offense, not to the date of the conduct that

> led to the punishment for the parole violation.

Id. at 879. (footnote omitted). *Accord, Cavanaugh v. Roller*, 984 F.2d 120 (4th Cir. 1993) cert. dismissed, 126 L.Ed.2d 409 (1993); *Fender v. Thompson*, 883 F.2d 303 (4th Cir. 1989); *Yamamoto v. Parole Commission*, 794 F.2d 1295 (8th Cir. 1986).

2. There is No Legitimate Basis to Grant Certiorari in this Case.

Petitioners rely upon Supreme Court Rule 10.1(b) as a reason for this Court to grant the Petition, on the ground that the decision of the Court of Appeals for the Eighth Circuit below is in conflict with the decision of the South Dakota Supreme Court below on this issue. Petitioners' reasoning would result in certiorari being granted in virtually every case where a writ is granted under 28 U.S.C. §2254. Under *Humphrey v. Cady*, 405 U.S. 504 (1972), a petitioner for federal habeas relief under 28 U.S.C. §2254 must have exhausted his state court remedies prior to filing his petition in federal court. The exhaustion requirement mandates *complete exhaustion* to the court of last resort in the state where the inmate is imprisoned. *Id.* at 516. Therefore, in virtually every case that a United States Court of Appeals either grants or affirms a writ of habeas corpus under 28 U.S.C. §2254, the state court of last resort below will have decided the federal question which is the basis of the habeas in a way that conflicts with the circuit court's decision. It is absurd to suggest, as Petitioners do, that every circuit court decision granting habeas corpus to a state prisoner should be reviewed by the United States Supreme Court.

Nor do Petitioners have grounds for certiorari pursuant to Supreme Court Rule 10.1(a). All of the decisions which the Petitioners claim are in conflict with the decision of the Eighth Circuit below are, upon scrutiny, clearly distinguishable. The only decision which even comes close is *Ewell v. Murray*, 11 F.3d 482 (4th Cir. 1993). *Ewell v. Murray*, however, is inapposite because it deals merely with the amendment of state prison administrative regulations, and not the amendment of statutory laws as in the case at bar. *Id.* at 483-84. Administrative regulations do not rise to the level of laws in the context of ex post facto jurisprudence, and are not subjected to ex post facto scrutiny. *Bailey v. Gardebring*, 940 F.2d 1150, 1156 (8th Cir. 1991). In South Dakota, good time credits are statutorily granted by SDCL §24-5-1 and, as made clear by the South Dakota Supreme Court below in *In re Williams*, 488 N.W.2d 667 (SD 1992), cannot be revoked absent express statutory authority. *Id.* at 669. Thus, the *Ewell v. Murray* case is not a legitimate ex post facto precedent and is clearly distinguishable from the case at bar.[1]

Indeed, it is the decision in *Fender v. Thompson*, 883 F.2d 303 (4th Cir. 1989), decided four years prior to *Ewell*, which

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[1]Based upon the above distinctions between legislative acts and administrative regulations, the Petitioners' prison administration argument falls short. Petitioners claim that "the impact of the Eighth Circuit's decision could severely limit the ability of prison officials to enact or amend rules which proscribe unsatisfactory conduct within a correctional institution." This is untrue because the ex post facto clause applies only to legislative acts, not administrative procedures. *Bailey v. Gardebring, supra.* Therefore, the Eighth Circuit's decision herein will not unduly constrict the legitimate regulatory discretion of prison administrators, so long as that discretion is exercised within the structure of constitutional legislative mandates.

controls the ex post facto issue in the Fourth Circuit. Mr. Fender was convicted of various offenses and sentenced to life imprisonment in 1973. *Id.* at 304. At that time the Virginia Code provided that Fender would become eligible for parole after serving 15 years of the sentence. *Id.* In 1985 the state's parole eligibility statutes were amended to provide that anyone sentenced to life imprisonment who escaped from prison would lose his parole eligibility. *Id.*

In 1987 Fender escaped from custody but was recaptured and convicted of one count of escape. *Id.* Thereafter the state informed him that, because of the 1985 amendment, he was no longer eligible for parole on his underlying conviction.

On Petition for Writ of Habeas Corpus, Fender argued that this law, as applied to him, was ex post facto because it effectively changed his sentence on the original conviction from life with possibility of parole to life without possibility of parole. *Id.* The district court rejected the argument, holding that the new law was "not an additional punishment retroactively imposed on Fender for his 1973 crimes. Instead it is a stiffened penalty for the later crime of escape, which occurred after the enactment of the statute." *Id.* This is the precise rationale espoused by the Petitioners herein.

Citing *Weaver v. Graham*, the Fourth Circuit held that the 1985 law was retrospectively applied to Fender because it expressly rescinded his pre-existing parole eligibility for the underlying conviction, on account of conduct which would not have resulted in the same sanction under the law existing at the time

of the original offense. *Id.* at 305. The court further held that such retrospective application of a statute modifying or revoking parole would, for prisoners who committed crimes before the statute's enactment, substantially alter the consequences attached to a crime already completed, in violation of the ex post facto clause. *Id.* at 306.

In *Fender*, as here, the government sought to avoid this conclusion by arguing that the new law did not operate retrospectively, because it was enacted before his escape and Fender, therefore, had "fair notice" of the potential consequences of such action. *Id.* Citing *Greenfield v. Scafati*, the *Fender* court held that, despite this "form over substance" argument, the "practical effect is a statutory increase in punishment for the first offense, enacted subsequent to the commission of the offense." *Id.* at 307. The Petition for Writ of Habeas Corpus was granted. *Id.*

Like the amendment in *Fender*, the 1983 amendment to SDCL §24-15-24 expressly granted authority to the parole board to revoke Respondent's pre-existing good time credits relating to the underlying conviction on account of conduct which would not have resulted in the same sanction under the laws existing at the time of the original offense. Therefore, per the *Fender* decision, the law in the Fourth Circuit is in accord with the Eighth Circuit decision below.

The other cases cited by the Petitioners in support of their Petition are all manifestly irrelevant to the issues before this Court. *United States v. Schramm*, 9 F.3d 741 (9th Cir. 1993) is

distinguishable because the sanction which Schramm received for the violation of his supervised release was available under the legislation existing at the time of his underlying offense and conviction. Therefore, he was not disadvantaged by the amended legislation. It should be pointed out that *United States v. Paskow, supra,* which is directly on point and supports the Respondent's arguments in the case at bar, was decided shortly after *Schramm* by the same court. The *Paskow* court distinguished *Schramm* at page 882, footnote 12.

Also, *State v. Bermudze*, 974 F.2d 12 (2nd Cir. 1992), cited by Petitioners is distinguished by the *Paskow* court at page 881, footnote 10.

In *United States v. Blackston*, 940 F.2d 877 (3rd Cir. 1991), and *United States v. Celestine*, 905 F.2d 59 (5th Cir. 1990), there were no ex post facto clause issues. Both cases involved the imposition of sanctions for violations of supervised release which were consistent with the laws existing at the time of the underlying offenses. It should be noted that the relevant holding from the Fifth Circuit is *Beebe v. Phelps*, 650 F.2d 774 (5th Cir. 1981).

Again, there is no ex post facto clause issue in the case of *United States v. Green*, 810 F.2d 999 (11th Cir. 1986), contrary to the assertion of the Petitioners. In *Green* the amended legislation which enhanced Green's sentence for the crime of being a convicted felon in possession of a firearm was enacted before Green committed the offense of possessing a firearm. The same situation obtained in the case of *United States v. Patterson*, 820

F.2d 1524 (9th Cir. 1987), cited by Petitioners. *Patterson*, of course, was decided by the Ninth Circuit, which recently stated the correct analysis for ex post facto cases in *United States v. Paskow, supra*.

Finally, the Eighth Circuit decisions cited by Petitioners, *Munger v. Erickson*, 979 F.2d 1323 (8th Cir. 1992), *Garner v. Howell*, 840 F.2d 660 (8th Cir. 1988), and *Schwindling v. Smith*, 777 F.2d 431 (8th Cir. 1985), are all easily distinguishable from the case at bar and, therefore, consistent with the Eighth Circuit's ruling in this case below.

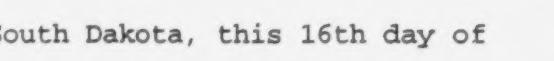
As demonstrated by the above arguments, the Eighth Circuit's decision below was required by controlling United States Supreme Court precedent and is consistent with all on-point decisions of other circuits. Consequently, there is no legitimate basis for granting the Petition for Writ of Certiorari.

CONCLUSION

For all of the reasons set forth above, Respondent respectfully requests that the Petition for Writ of Certiorari be denied.

Dated at Sioux Falls, South Dakota, this 16th day of February, 1995.

Respectfully submitted,



DOUGLAS E. HOFFMAN
Counsel of Record
GIBBS, FEYDER, MYERS,
PETERS & HOFFMAN
Attorneys for Respondent
P. O. Box 1085
Sioux Falls, SD 57101-1085
(605) 336-3700